

**THE OFFICE OF CONTRACTING AND PROCUREMENT**

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**NOTICE OF FINAL RULEMAKING**

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The Chief Procurement Officer of the District of Columbia, pursuant to authority granted by sections 202(a) and 204 of the District of Columbia Procurement Practices Act of 1985, as amended, ("PPA"), effective February 21, 1986 (D.C. Law 6-85; D.C. Official Code §§2-302.02(a) and 2-302.04), and Mayor's Order 2002-207, dated December 18, 2002, hereby gives notice of its adoption of the following final rules, amending Chapter 33 of Title 27 of the *District of Columbia Municipal Regulations (Contracts and Procurements)*. The proposed rules are intended to amend those sections of Chapter 33 of Title 27 *D.C. Municipal Regulations*, which concern contract cost principles in order to clarify the contractor's responsibility in establishing cost reasonableness.

The rules were approved as proposed rules on January 17, 2003. No substantive changes have been made to the text of the proposed rules, as published in the Notice of Proposed Rulemaking in the *D.C. Register* on February 21, 2003, 50 at 1751.

The Council of the District of Columbia approved these rules on October 23, 2003, pursuant to section 205(a) of the Procurement Practices Act (D.C. Official Code §2-302.02(a)).

**CHAPTER 33****CONTRACT COST PRINCIPLES**

*Section 3307 is amended to read as follows:*

**3307 DETERMINING REASONABLENESS**

- 3307.1 The contracting officer shall determine a cost to be reasonable if it does not differ from or exceed in amount that which would be incurred by a prudent person in the conduct of a competitive business, in accordance with the provisions of this chapter.
- 3307.2 In determining the reasonableness of a given cost, the contracting officer shall consider the following factors:
- (a) Whether the cost is of a type generally recognized as ordinary and necessary for the conduct of the contractor's business or the performance of the contract;

- (b) The restraints or requirements imposed by generally accepted sound business practices, arms length bargaining, federal and District laws and regulations, and contract terms and specifications;
  - (c) The action that a prudent business person would take, considering responsibilities to the owner of the business, employees, customers, the District, and the public at large;
  - (d) Any significant deviations from the established practices of the contractor that may unjustifiably increase the contract costs; and
  - (e) Any other relevant factors.
- 3307.3 Reasonableness of specific costs must be examined with particular care in connection with firms or their separate divisions that may not be subject to effective competitive restraints.
- 3307.4 No presumption of reasonableness shall be attached to the incurrence of costs by a contractor.
- 3307.5 If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable.

## OFFICE OF THE CORPORATION COUNSEL

## NOTICE OF FINAL RULEMAKING

Pursuant to the authority set forth in section 861 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979, D.C. Law 2-139, as added by the Legal Service Establishment Amendment Act of 1998 ("Legal Service Act"), effective April 20, 1999, D.C. Law 12-260, D.C. Official Code § 1-608.61 (2001), the Corporation Counsel hereby gives notice that final rulemaking action was taken to adopt the following rules.

These rules amend Chapter 36 of the District of Columbia Personnel Regulations, pertaining to the Legal Service. The amendment allows the Corporation Counsel the option of appointing two or more Evaluation Panels to review the draft annual performance evaluations for Legal Service line attorneys. Previously, Chapter 36 provided for the appointment of only one Evaluation Panel to perform this function.

No comments were received and no changes made to the rules under the notice of emergency and proposed rulemaking published at 50 DCR 8903 (October 17, 2003). Final rulemaking action was taken on January 21, 2004.

Chapter 36 of the D.C. Personnel Regulations is amended as follows:

Subsections 3605.5, 3605.6, and 3605.7 of section 3605 (Evaluation of Performance -- Office of the Corporation Counsel Line Attorneys) are amended to read as follows:

- 3605.5 Beginning with the rating period 2000-2001, the Corporation Counsel shall select a three (3) member Evaluation Panel of attorneys at the DS-15 level or above. Beginning with the rating period 2002-2003, the Corporation Counsel shall select at least one, and may select two or more, three (3) member Evaluation Panels of attorneys at the DS-15 grade or above.
- 3605.6 The Evaluation Panel or Panels shall collectively review the evaluations of all line attorneys to assure that the evaluations comply with this Chapter and that performance standards are being applied consistently throughout the Office. When two (2) or more Panels have been appointed, each Panel may review only a proportionate share of all the evaluations submitted. The Evaluation Panel or Panels shall complete their review and make any recommendations for changes to the Corporation Counsel within twenty (20) days of receipt of the evaluations.
- 3605.7 As soon as practicable after the receipt of the recommendations of the Panel or Panels, the Corporation Counsel shall complete his or her review. In reviewing evaluations of line attorneys, the Corporation Counsel may consult with the supervisor who prepared the evaluation, any person who prepared an advisory evaluation, and the supervisors in the chain of command for the relevant unit.

## THE MAYOR OF THE DISTRICT OF COLUMBIA

## NOTICE OF FINAL RULEMAKING

The Mayor of the District of Columbia, pursuant to authority granted by section 202(a) of the District of Columbia Procurement Practices Act of 1985, as amended, effective February 21, 1986 (D.C. Law 6-85; D.C. Official Code §2-302.02(a)) (PPA), hereby gives notice of the adoption of the following final rules, amending Chapter 38 of Title 27 of the *District of Columbia Municipal Regulations (Contracts and Procurements)*. The rules will amend those sections of Title 27 *D.C. Municipal Regulations*, Chapter 38 which concerns protests, claims and disputes in order to reflect the current provisions of the PPA.

The rules were approved as emergency and proposed rules on September 30, 2002, and a second Emergency Rulemaking was published on January 31, 2003, at 50 DCR 1050. No substantive changes have been made to the text of the proposed rules, as published in the Notice of Emergency and Proposed Rulemaking in the *D.C. Register* on October 11, 2002, at 49 DCR 9348.

The Council of the District of Columbia approved these rules on October 28, 2003, pursuant to section 205(a) of the Procurement Practices Act (D.C. Official Code §2-302.02(a)).

## CHAPTER 38

## PROTESTS, CLAIMS AND DISPUTES

## 3800 PROTESTS

- 3800.1 In accordance with the provisions of §903 of the District of Columbia Procurement Practices Act of 1985 (Act) (D.C. Official Code §2-309.03), as amended, all protests shall be filed with the District of Columbia Contract Appeals Board (which has original jurisdiction to decide all protests of solicitations or awards), in accordance with chapter 1 of this title.
- 3800.2 Each solicitation issued by the District shall inform prospective bidders or offerors that protests must be filed in accordance with the provisions of §908 of the Act (D.C. Official Code §2-309.08), as amended, and the rules of the Contract Appeals Board.

## 3801 CONTRACT DISPUTES

- 3801.1 District agencies shall attempt to resolve all disputes arising under or relating to contracts

by mutual agreement after informal discussions between the contractor and the contracting officer.

- 3801.2 Each District contract shall contain a disputes clause, approved by the Chief Procurement Officer ("CPO"), that provides for resolution of disputes in accordance with the provisions of this chapter.
- 3801.3 Any dispute arising under or relating to a contract which is not resolved by informal discussions between the contracting officer and the contractor pursuant to §3801.1 may be treated as a claim and pursued under the appropriate provisions of the Act and this chapter.
- 3801.4 Claims by the District government against a contractor shall be decided by the contracting officer in accordance with §803 of the Act (D.C. Official Code §2-308.03) and §3802 of this chapter.
- 3801.5 Claims by a contractor against the District government shall be filed with and decided by the contracting officer in accordance with §805 of the Act (D.C. Official Code §2-308.05) and §3803 of this chapter.

## **3802 CLAIMS BY DISTRICT GOVERNMENT AGAINST CONTRACTORS**

- 3802.1 All claims by the District government against a contractor arising under or relating to a contract shall be decided by the contracting officer. The contracting officer shall send the written decision regarding the claim to the contractor.
- 3802.2 The contracting officer's written decision shall do the following:
- (a) Provide a description of the claim or dispute;
  - (b) Refer to the pertinent contract terms;
  - (c) State the factual areas of agreement and disagreement;
  - (d) State the reasons for the decision, including any specific findings of fact, although specific findings of fact are not required and, if made, shall not be binding in any subsequent proceeding;
  - (e) Indicate that the written document is the contracting officer's final decision; and
  - (f) Inform the contractor of the right to seek further redress by appealing the decision to the Contract Appeals Board.
- 3802.3 The decision of the contracting officer shall be final and not subject to review unless an administrative appeal or action for judicial review is timely commenced as authorized by §904 of the Act, as amended (D.C. Official Code §2-309.04).
- 3802.4 The authority contained in this section shall not apply to a claim or dispute for penalties or forfeitures by statute or regulation which another District agency is specifically authorized to administer, settle, or determine.
- 3802.5 This section shall not authorize the contracting officer to settle, compromise, pay, or otherwise adjust any claim involving fraud.
- 3802.6 Pending final decision of an appeal, action, or final settlement, the contractor shall

proceed diligently with performance of the contract in accordance with the decision of the contracting officer.

### **3803 CLAIMS BY CONTRACTORS AGAINST DISTRICT GOVERNMENT**

- 3803.1 Contractors shall attempt to resolve all disputes by discussion and agreement with the contracting officer before filing a written claim.
- 3803.2 If a contractor is unable to resolve a dispute arising under or relating to a contract through informal discussions, the contractor may file a written claim with the contracting officer in accordance with this section.
- 3803.3 The contractor's claim shall be in writing, shall be delivered in person or mailed by certified mail, return receipt requested, to the contracting officer, and shall contain at least the following:
- (a) A description of the claim and the amount in dispute;
  - (b) Any data or other information in support of the claim;
  - (c) A brief description of the contractor's efforts to resolve the dispute prior to filing the claim; and
  - (d) The contractor's request for relief or other action by the contracting officer.
- 3803.4 The contracting officer may meet with the contractor in a further attempt to resolve the claim by agreement.
- 3803.5 If the claim is not resolved by mutual agreement, the contracting officer shall issue a written decision on any submitted claim of \$50,000 or less within sixty (60) calendar days from receipt of a written request from a contractor that a decision be rendered within that period.
- 3803.6 The contracting officer shall issue a written decision on any claim over \$50,000 within ninety (90) calendar days of receipt of such a claim, whenever possible taking into account factors such as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.
- 3803.7 The contracting officer's written decision shall do the following:
- (a) Provide a description of the claim or dispute;
  - (b) Refer to the pertinent contract terms;
  - (c) State the factual areas of agreement and disagreement;
  - (d) State the reasons for the decision, including any specific findings of fact, although specific findings of fact are not required and, if made, shall not be binding in any subsequent proceeding;
  - (e) If all or any part of the claim is determined to be valid, determine the amount of monetary settlement, the contract adjustment to be made, or other relief to be granted;
  - (f) Indicate that the written document is the contracting officer's final decision; and
  - (g) Inform the contractor of the right to seek further redress by appealing the

decision to the Contract Appeals Board.

- 3803.8 The contracting officer's decision shall be delivered or mailed by certified mail, return receipt requested, to the contractor, and a copy shall be maintained in the contract file.
- 3803.9 Any failure by the contracting officer to issue a decision on a claim within the required time period will be deemed to be a denial of the claim, and will authorize the commencement of an appeal to the Contract Appeals Board, as authorized by §904 of the Act, as amended (D.C. Official Code §2-309.04).
- 3803.10 If a contractor is unable to support any part of his or her claim and it is determined that the inability is attributable to a material misrepresentation of fact or fraud on the part of the contractor, the contractor shall be liable to the District government for an amount equal to the unsupported part of the claim in addition to all costs to the District government attributable to the cost of reviewing that part of the contractor's claim.
- 3803.11 Liability under §3803.10 shall be determined within 6 years of the commission of the misrepresentation of fact or fraud.
- 3803.12 The decision of the contracting officer shall be final and not subject to review unless an administrative appeal or action for judicial review is timely commenced by the contractor as authorized by §904 of the Act (D.C. Official Code §2-309.04).
- 3803.13 Pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the decision of the contracting officer.

#### 3899 DEFINITIONS

- 3899.1 When used in this chapter, the following terms and phrases shall have the meanings ascribed:

**Claim** - a written demand or written assertion by the District or a contractor seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.

**Person** - any natural person, corporation, firm, association, organization, partnership, business, or trust.

**CPO or Chief Procurement Officer** - the Chief Procurement Officer of the Office of Contracting and Procurement.